No. 88-1459

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITIES COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT GULF STATES UTILITIES COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the grievance and arbitration provisions of the applicable collective bargaining agreement are mandatory, exclusive and binding. If so, Daigle's suit is barred by the six-month limitations period made applicable to hybrid Section 301/fair representation suits by *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983).

2. Whether alleged false and misleading statements by an employer to a union, which are said to have caused the union not to pursue a grievance on behalf of an individual, but which are not said to have had anything to do with the individual's late filing of a Section 301/fair representation suit, should render the *DelCostello* limitations period inapplicable.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Ambrose Daigle (Daigle).

Respondent is Gulf States Utilities Company (GSU).

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OPINIONS BELOW

Daigle's first Petition for Writ of Certiorari in this case was denied. *Daigle v. Gulf State[s] Utilities Co., Local No. 2286*, 794 F.2d 974 (5th Cir.) *cert. denied*, 479 U.S. 1008 (1986).

This Second Petition for Writ of Certiorari challenges a subsequent opinion by a three-judge panel of the Court of Appeals, which was not published. (5th Cir., No.

87-6252). The memorandum opinion of the magistrate was not published. (E.D. Tex., No. B-83-704-CA). The opinions of the lower courts are reproduced, with typographical errors, in Appendix A of the Petition for Writ of Certiorari. Hereinafter, references designated as "App. ___" are to Appendices of the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

Section 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b), is cited and reproduced in the Petition (App. B.). Section 10(b)'s six-month limitations period was made applicable to hybrid § 301/fair representation suits in *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983). Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, is cited and reproduced in the Appendix to this Brief. Section 301 authorizes suits for violations of collective bargaining agreements.

STATEMENT OF THE CASE

Petitioner Daigle's employment with respondent Gulf States Utilities Company (GSU) was terminated on October 12, 1982, as the result of his violation of a work

rule. (App. A., pp. la, 5a). At the time, Daigle was a member of a collective bargaining unit of employees represented by the International Brotherhood of Electrical Workers, Local 2286 (IBEW). (App. A, p. 2a). On November 19, 1982, Daigle was notified by IBEW that it would not pursue a grievance on his behalf under the applicable collective bargaining agreement. (*Id.*). Daigle filed suit on August 8, 1983 against GSU, IBEW, and other parties. (*Id.*). Daigle's complaint alleged, among other things, that GSU had breached the collective bargaining agreement by discharging him wrongfully without "just cause," and that IBEW had breached "its duty of fair representation by not pursuing grievance procedures." (*Id.*).

Daigle's suit was filed approximately ten (10) months after his discharge and nine (9) months after IBEW notified him that it would not pursue a grievance on his behalf.

The trial court dismissed Daigle's claims against all parties. In part relevant here, suit against GSU and IBEW was dismissed as time-barred by the applicable six-month limitations period established by this Court in *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983). (App. A, pp. 2a, 5a). The fifth circuit affirmed the dismissal of all claims and parties, with the sole exception of Daigle's wrongful discharge claim against GSU. *Daigle v. Gulf State[s] Utilities Co., Local No. 2286*, 794 F.2d 974 (5th Cir.), *cert. denied*, 479 U.S. 1008 (1986). The fifth circuit concluded that Daigle's wrongful discharge claim against GSU was time-barred by the six-month *DelCostello* limitations period *if* the applicable collective bargaining agreement contained mandatory, exclusive, and binding grievance and arbitration procedures. 794 F.2d at 978. On the other hand, the court concluded that the four-year

state law limitations period for breach of contract suits would apply if the procedures were "alternative procedures, leaving the aggrieved employee and the exclusive bargaining representative free to use or not use them as they wish." *Id.* Unfortunately, the collective bargaining agreement itself was not in the record. For this reason, the fifth circuit remanded Daigle's claim against GSU to the magistrate with instructions to interpret the collective agreement, and to apply the appropriate limitations period. *Id.* at 981. This Court denied Daigle's first Petition for Writ of Certiorari on December 8, 1986.

On remand, the magistrate concluded that the applicable grievance and arbitration provisions are mandatory, exclusive, and binding, and that Daigle's suit is therefore time-barred by the *DelCostello* limitations period. The case was dismissed by Memorandum Opinion and Order dated November 5, 1987 (App. A, pp. 5a-9a), and the fifth circuit affirmed in an unpublished opinion dated October 20, 1988 (App. A, pp. la-4a). Daigle's motion for panel rehearing was denied on November 17, 1988 (App. A, p. 11a), and once again he has petitioned this Court for a Writ of Certiorari.

The questions raised by the Petition are insubstantial and do not warrant review by this Court.

REASONS FOR DENYING THE WRIT

1. The courts below correctly held that the applicable grievance and arbitration procedures are mandatory, exclusive and binding, and that Daigle's suit is therefore time-barred by the *DelCostello* six-month limitations

period. Daigle's argument that the procedures are "optional" was correctly rejected by the lower courts, and further review of the matter by this Court is unnecessary.

Before turning to the correctness of the decisions below with respect to the contract interpretation question, it is first necessary to dispel some confusion created by the Petition. Daigle seems to argue that he was not required to "exhaust" contractual remedies. This argument is irrelevant because the courts below held that his suit is barred by limitations, not by his failure to "exhaust" contractual remedies. Of course, the general rule *is* that an individual who asserts a breach of a collective bargaining agreement must attempt to "exhaust" the agreement's grievance and arbitration procedures. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). However, the general *Maddox* "exhaustion" rule does not apply in a hybrid Section 301/fair representation suit. *DelCostello, supra*, 462 U. S. at 164. Indeed, the hybrid Section 301/fair representation theory was recognized in the first place because it would be inequitable to penalize an individual for his exclusive bargaining representative's refusal to "exhaust" mandatory, exclusive and binding contractual procedures in breach of its duty of fair representation. *Id.* at 164 & n. 14. Therefore, the dispositive issue in this appeal is not whether Daigle was required to "exhaust" the grievance and arbitration procedures of the collective bargaining agreement, but whether the procedures themselves are mandatory, exclusive and binding such that an aggrieved individual's sole judicial recourse for an alleged breach of the agreement is a Section 301/fair representation suit to which the *DelCostello* limitations period applies.

The progressive step grievance and arbitration procedures are set out in the record and summarized in the opinions below. (App. A, pp. 3a, 7a-8a). It is provided that "all . . . grievances must be presented and processed solely in accordance with" the procedure, and that any grievance not so presented and processed "will be deemed to no longer exist." (App. A, p. 31). Granted, the last step provides that a grievance not resolved earlier "may" be brought to "binding" arbitration. (App. A, p. 8a). The fifth circuit correctly held, however, that this word "may," read in the context of the agreement and federal labor law policy in favor of arbitration, simply grants the claimant "permission to abandon his complaint. However, if he chooses to pursue it, his exclusive remedy is through the procedures contained in the agreement." (App. A at p. 4a).

The fifth circuit's holding is consistent with well-established precedent. *See e.g., Republic Steel Corporation v. Maddox,* 379 U.S. 650, 658-59 (1965) (any doubts that "[u]se of the permissive 'may'" would permit avoidance of "the contract procedure . . . in favor of a judicial suit . . . must be resolved against such an interpretation."); *United Steelwkrs. of Amer. v. American Mfg. Co.,* 363 U.S. 564 (1960) (holding that arbitration of a dispute was required in a case where arbitration article was prefaced with the word "may"); *Ceres Marine Term. v. Intern. Longshoremen's Ass'n,* 683 F.2d 242, 248 (7th Cir. 1982) (rejecting employer's argument that use of word "may" in arbitration article made contractual procedure optional); *Local 771, I. A. T. S. E., AFL-CIO v. RKO General, Inc.,* 546 F.2d 1107, 1116 (2d Cir. 1977) (rejecting argument that

word "may" in arbitration article implied that "the parties had the option of invoking some remedy other than arbitration."); *Bonnot v. Congress of Independent Unions Local #14*, 331 F.2d 355, 359 (8th Cir. 1964) (holding by Justice Blackmun that "The obvious purpose of the 'may' language is to give an aggrieved party the choice between arbitration or the abandonment of its claim."); *Deaton Truck Line, Inc. v. Local Union 612, Etc.*, 314 F.2d 418, 422 (5th Cir. 1962) (rejecting argument that word 'may' prevented arbitration from being "compulsory or obligatory.").

2. Daigle's remaining arguments are infirm, and review of these arguments by the Court is not warranted.

Daigle seems to argue that GSU is "estopped" from interposing a limitations defense on the asserted ground that GSU, through "misstatements, [and] willful and known falsehoods," induced IBEW not to pursue a grievance. (Petition at 3). GSU denies these factual allegations but they are not material here. Even if these spurious factual allegations were true, GSU's alleged "false statements" to IBEW are said to have been made prior to November 19, 1982, the date on which IBEW notified Daigle that, based on its investigation of the facts, it would not pursue a grievance on Daigle's behalf. (Petition at 3). On November 19, 1982, the *DelCostello* limitations period began to run because on that date Daigle was put on notice that his case would proceed no further through the contractual procedures. *Daigle, supra*, 794 F.2d at 978. Daigle has never argued that GSU in any manner prevented or delayed his filing of a *lawsuit* after the accrual of his alleged cause of action. Therefore, even if GSU told "falsehoods" to IBEW so that IBEW would

not pursue a *grievance,* which is denied, such "falsehoods" could not have had anything to do with Daigle's nine (9) month delay in filing suit.

Finally, Daigle seems to argue that his late filing of suit should be excused because he has accepted the "finality" of his discharge and seeks damages rather than reinstatement. The authority he cites for this proposition, including *Cabarga Cruz v. Fundacion Educativa Ana G. Mendez,* 822 F.2d 188 (1st Cir. 1987), does not even address it. Apparently, Daigle's "finality" argument is a throwback to an argument rejected by the Court in *Maddox, supra.* Maddox argued, among other things, that the general "exhaustion" requirement should be excused in his case because he had accepted the "finality" of his discharge and was only seeking severance pay. Thus, Maddox asserted, the fact that he had bypassed the contractual grievance and arbitration procedures and had filed a lawsuit posed no threat to the stability of the ongoing collective bargaining relationship between his former employer and the union. The Court disagreed with Maddox, and reasoned as follows:

> "Although it is true that the employee asserting the claim will necessarily have accepted his discharge as final, it does not follow that the resolution of his claim can have no effect on future relations between the employer and other employees. Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship. Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a

> severance-pay claim. But even in that narrow situation, if applicable law did not require resort to contract procedures, the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement."

379 U.S. at 656. Under the Court's reasoning in *Maddox*, Daigle's "finality" argument would be infirm even if his case turned on "exhaustion" rather than limitations. If possible, the "finality" argument is less persuasive in the limitations context because Daigle's acceptance of his discharge has nothing at all to do with the timeliness of his suit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

29 U.S.C. § 185. **Suits by and against labor organizations**

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena [sic], or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.